FILED

No. 961324 FEB 20 1996

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In The

Supreme Court of the United States

October Term, 1996

MARINA ZARNES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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60 pp

QUESTION PRESENTED

I. Where Petitioner's prior counsel failed to challenge the findings as to the amount of methamphetamine and, based on such findings, Petitioner was subject to a 10-year mandatory minimum sentence rather than a 5-year mandatory minimum, did the Seventh Circuit Court of Appeals render a decision which conflicted with other Circuits by finding that Petitioner failed to make a substantial showing of a denial of a constitutional right in a § 2255 Petition when denying the certificate of appealability.

II. Do the provisions of the AEDPA, as they relate to the procedures under 28 U.S.C. § 2255, violate the Constitution of the United States, as said provisions impose significant restrictions on the process for filing and appealing matters related to the § 2255 petition.

III. Absent any clear language on the part of Congress, and given the different interpretations between the Circuit Courts as to the retroactive application of the provisions of the AEDPA, did the Seventh Circuit err in applying the Certificate of Appealability requirement of the AEDPA to Petitioner's case when the original § 2255 petition was filed prior to the enactment date of the AEDPA.

LIST OF ALL PARTIES

The following is a list of all parties to the proceeding in the Court of Appeals for the Seventh Circuit:

1. **MARINA ZARNES**, *Defendant/Appellant/Petitioner;*

2. **UNITED STATES OF AMERICA**, *Plaintiff/Appellee/Respondent.*

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OPINIONS BELOW

As to the denial of Petitioners § 2255 Motion, there are no other reports or opinions, other than the Seventh Circuit's denial of a Certificate of Appealability and District Court's Order, which can be found in the Appendix, beginning at App. 7. However, Petitioner did have her direct appeal denied by the Seventh Circuit in ***United States v. Zarnes***, 33 F.3d 1454 (7th Cir.1994). As the Opinion of said direct appeal exceeds fifteen (15) pages, as reported, it has not been made part of the Appendix.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Given the Denial of a Certificate of Appealability by the United States Court of Appeals for the Seventh Circuit, dated and entered on September 30, 1996, and the subsequent Mandate, issued October 22, 1996, the jurisdiction of this Honorable Court is invoked under Title 28 U.S.C. §1254(1).

The timeliness of the Petitioner's filing is governed by Supreme Court Rule 13.4.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

1. Prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, 1220-21 (1996), Title 28 U.S.C. §2255, in pertinent part, stated:

> *"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, . . ., or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.*
>
> *A motion for such relief may be made at any time.*
>
> . . .
>
> *An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus."*

2. Pursuant to §105 of the AEDPA, §2255 was amended, in pertinent part, as follows:

> *"(1) by striking the second and fifth undesignated paragraphs; and*

(2) by adding at the end the following new undesignated paragraphs:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of --

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence."

3. Pursuant to §102 of the AEDPA, Title 28 U.S.C.§2253 was amended, in its entirety, to read as follows:

"(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

> *(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or by striking the second and fifth undesignated paragraphs; and*
>
> *(B) the final order in a proceeding under section 2255.*
>
> *(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.*

> *(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)"*

4. Pursuant to §103 of the AEDPA, Rule 22 of the Federal Rules of Appellate Procedure was amended, in pertinent part, to read as follows:

> *". . . (b) Certificate of Appealability -- In a habeas corpus proceeding in which the detention complained of arises out of a process issued by a State court, am appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to section 2253(c) of title 28, United States code. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of appealability or state reasons why such a certificate should not issue. The certificate or the statement shall br forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the*

judges of the court of appeals. If an appeal is taken by a State or its representative, a certificate of appealability is not required."

5. In pertinent part, the Sixth Amendment to the United States Constitution recites:

"In all criminal prosecutions, the accused shall enjoy the right to...have the Assistance of Counsel for his defense."

To prevail on a claim of ineffective assistance of counsel at sentencing, it has been held that a defendant must demonstrate (i) a deficient performance on the part of his attorney; and (ii) that the result of the sentencing proceeding was rendered unreliable or unfair as a result of counsel's deficiencies. See ***Lockhart v. Fretwell***, 506 U.S. 364, 369-70, 113 S.Ct. 838, 842-43, 122 L.Ed.2d 180 (1993).

6. In pertinent part, Title 21 U.S.C. §841(b) sets forth the following punishments for offenses involving particular amounts of methamphetamine:

"(1)(A) In the case of a violation of subsection (a) of this section involving . . . 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be

sentenced to a term of imprisonment which may not be less than 10 years or more than life . . . .

(1)(B) In the case of a violation of subsection (a) of this section involving . . . 10 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years . . . ".

STATEMENT OF THE CASE

On July 14, 1989, Petitioner and nine other individuals were named in a two-count Indictment. Of these two Counts, Petitioner was charged in Count One only, which set forth a conspiracy to manufacture and distribute methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Petitioner pleaded not guilty, and proceeded to trial on March 14, 1990. The jury, subsequently found Petitioner guilty of the charged conspiracy. As a result of said conviction, Petitioner was sentenced to a term of 120 months imprisonment.

Petitioner appealed the conviction and sentence to the Seventh Circuit Court of Appeals. Said appeal raised issues surrounding (a) the sufficiency of the evidence; (b) the admission into evidence of certain recorded

conversations; (c) the admission of Petitioner's prior testimony as to the sale of marijuana and cocaine; (d) the admission of methamphetamine seized at Petitioner's trailer; and (e) a potential Double Jeopardy violation. In ***United States v. Zarnes***, 33 F.3d 1454 (7th Cir.1994), the Seventh Circuit affirmed the convictions and sentence.

Petitioner, acting *pro se*, then filed a motion, pursuant to 28 U.S.C. § 2255, with the court in the Central District of Illinois. Said Motion raised six issues, to wit: (1) Sufficiency of the evidence; (2) Double Jeopardy violation; (3) the imposition of an upward departure; (4) the calculation of the amount of methamphetamine; (5) the "relevant conduct" findings; and (6) ineffective assistance of counsel.

In an Order dated May 24, 1996, the district court summarily dismissed Petitioner's Motion, finding that it plainly appeared from the face of the motion and the prior proceedings that Petitioner was not entitled to relief. The district court, further, declined to issue a Certificate of Appealability.

Petitioner then filed a Notice of Appeal regarding the denial of the § 2255 Motion. In an Order dated September 30, 1996, the Seventh Circuit Court of Appeals, finding no substantial showing of a denial of a constitutional violation, denied the request for a Certificate of Appealability. Petitioner, through counsel, requested a reconsideration of said Order. This request for reconsideration was, likewise, denied.

At issue in the present pleadings is the Seventh Circuit's denial of the Certificate of Appealability, and the application of the new requirements of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, 1220-21 (1996), Title 28 U.S.C. §2255, as they relate to § 2255 Petitions.

ARGUMENT

A. The United States Court of Appeals for the Seventh Circuit has rendered a decision that is in conflict with the decisions of the United States Supreme Court, thereby calling for the exercise of the Supreme Court's supervisory power.

As stated above, Petitioner had included a claim of ineffective assistance of counsel, a Sixth Amendment violation, in her original § 2255 Petition. As a basis for such a claim, Petitioner set forth that her prior counsel failed to adequately challenge the quantity of methamphetamine on which her sentence was calculated. The Seventh Circuit, in denying the Certificate of Appealability, found that Petitioner failed to establish the denial of a Constitutional right.

As to the issue of whether or not Petitioner had adequately shown that, due to prior counsel's failure to argue against the finding of 100 grams of pure methamphetamine, she was denied her Sixth Amendment

right to effective assistance of counsel, Petitioner asserts that the United States Court of Appeals for the Seventh Circuit has rendered a decision that is in conflict with the decisions of the United States Supreme Court in ***Lockhart v. Fretwell***, 506 U.S. 364, 369-70, 113 S.Ct. 838, 842-43, 122 L.Ed.2d 180 (1993) and ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

According to this Honorable Court, the prejudice prong of the test for ineffective assistance of counsel is met by showing the existence of a reasonable possibility that, but for counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Strickland*** 104 S.Ct. at 2068.

In the case at bar, Petitioner's "ineffective assistance" claim, regarding her sentencing, was denied based on the district court finding that, due to Petitioner receiving the mandatory minimum for her crime, "Zarnes' attorney could have done nothing to reduce the sentence she received." However, the problem which existed is **which** mandatory minimum, 5-year or 10-year, was applicable to Petitioner. At the time of sentencing, Petitioner was said to have been involved with 907.2 grams of methamphetamine. However, the district court found Petitioner responsible for 100 grams of "pure" methamphetamine, based on the PSR and the arguments of the government. Such an amount translated to a 10-

year mandatory minimum sentence. Petitioner's counsel failed to challenge such a finding.

Petitioner asserts that, due to counsel's failure to address the finding that there existed 100 grams of "pure" methamphetamine, the prejudice prong of the ***Strickland*** test can be satisfied, as prior counsel was deficient and, but for such deficient performance, there existed a reasonable probability that Petitioner's sentence would have been significantly lower than that which was imposed. Prior counsel neglected, even at a minimum to defend his client's interests at sentencing by failing to challenge the amount of "pure" methamphetamine. The result of this failure rendered Petitioner's sentence unreliable and/or unfair.

Petitioner argues that methamphetamine, as produced through normal chemical processes, contains a number of impurities. ***United States v. Bogusz***, 43 F.3d 82, 87 (3rd Cir.1994)(citing, U.S.S.G. § 2D1.1, comment. (n.10)). See also ***United States v. Spencer***, 4 F.3d 115, 121 (2d Cir. 1993) (methamphetamine results from a "chemical reaction which yields a mixture of methamphetamine and various impurities"); ***United States v. Stoner***, 927 F.2d 45, 47 (1st Cir.) (methamphetamine "virtually never is pure"), ***cert. denied***, __U.S.__, 112 S.Ct. 129, 116 L.Ed.2d 96 (1991).

The term "pure methamphetamine" is a misnomer and cannot be distinguished without a polarity test or other laboratory tests to determine how the process was initiated, that no mistakes were made, and that the type

of methamphetamine produced was indeed alleged "pure methamphetamine".

Once again, this argument was never properly presented by prior counsel, and the resulting prejudice was a more severe sentence being imposed upon Petitioner. Therefore, Petitioner submits that, based on the above, the district court erred in summarily denying the § 2255 Motion. Furthermore, the Seventh Circuit extended this error by finding that no constitutional violation existed, and failing to grant Petitioner the opportunity to appeal the issues.

B. **The exercise of the Supreme Court's supervisory power is requested to determine whether the provisions of the AEDPA, relating to §2255 Petitions, are violative of the United States Constitution.**

On April 24, 1996, the AEDPA was signed into law by the President. Prior to said signing, 28 U.S.C. § 2255 allowed for the filing of petitions attacking the sentence to be made "at any time". However, § 105 of the AEDPA has significantly changed the time for filing § 2255 petitions by setting a one-year limitation from the latest of four listed occurrences.

It is asserted that such a limitation is violative of the "Suspension Clause" of the United States Constitution, which states:

> "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

U.S. Const. Art.I, § 9, cl. 2.

The "Suspension Clause" has been interpreted to protect post-conviction remedies that may displace a general Habeas Corpus petition. See ***Hill v. United States***, 368 424, 427 (1962); ***United States v. Hayman***, 342 U.S. 205 (1952); ***United States v. Smith***, 331 U.S. 469 (1947). Furthermore, the Supreme Court has recognized the absence of a statute of limitations and the inapplicability of the laches doctrine as being essential attributes of habeas corpus provisions. See ***Heflin v. United States***, 358 U.S. 415 (1959)(separate opinion of Stewart. J.).

Clearly, a petition pursuant to § 2255 is a post-conviction remedy very similar to the Habeas Petition, and the new one-year filing requirement amounts to a statute of limitations. As such, § 105 of the AEDPA is unconstitutional.

The restriction placed on those seeking § 2255 relief comes in the area of appealing the district court's denial of the original motion. Under the provisions of the AEDPA, in order to appeal the denial of a § 2255 petition, the Petitioner must acquire a Certificate of Appealability. According to § 104 of the AEDPA, amending 28 U.S.C. § 2253, "[a] certificate of

appealability may issue under paragraph (1) only if the appellant has made a substantial showing of the denial of a constitutional right." Such a requirement appears to take away any opportunity for appellate review.

First, if a petitioner makes a "substantial showing" at the district court level, there would be no need to appeal as the district court, in fulfilling its duty to review such claims, would have nothing to do but extend the relief requested by the petitioner, or at the very least grant an evidentiary hearing.

Next, if the certificate of appealability is to be issued by a district court judge, and said judge summarily dismisses the petition, it is submitted that the record sent to the appellate court would consist of anything that would constitute a "substantial showing", as many § 2255 petitions are presented by the petitioners *pro se*, and, given the limited access to law libraries, are usually loosely worded and lacking significant case law. Such is the case with the Petitioner's denial of her certificate of appealability. As outlined above, there does exist a valid Sixth Amendment claim. However, due to Petitioner's lack of knowledge with the statutes and sentencing guidelines, the violation was said to be made by a "substantial showing".

As set out above, the restrictions which are now imposed by the AEDPA are clearly in violation of the Constitution.

C. The exercise of the Supreme Court's supervisory power is requested to determine if the provisions of the AEDPA, relating to §2255 Petitions, are subject to retroactive application.

Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), provides the analytical framework for determining whether newly enacted statutory provisions are applicable to pending cases. A court's first, and sometimes last, task under ***Landgraf*** analysis is "to determine whether Congress has expressly prescribed the statute's proper reach." ***Id***. at ___, 114 S.Ct. at 1505. If Congress has done so, that is the end of the ***Landgraf*** analysis, and the court simply follows the evident intent of Congress. ***Id***. However, where the congressional intent about applicability to pending cases is not evident, or is nonexistent, more is required. The more that is required is application of the judicial default rules specified in ***Landgraf***.

Under the ***Landgraf*** rules, a newly enacted statutory provision is to be applied to pending cases, including appeals, unless doing so would give the provisions "retroactive effect". ***Landgraf*** , 114 S.Ct. at 1505. If applying the new provision to a pending case would have retroactive effect, then the presumption goes the other way; absent an express congressional command, statutory provisions are not to be given retroactive effect. ***Landgraf*** , 114 S.Ct. at 1501, 1505.

Reviewing the provisions of the AEDPA, it is asserted that Congress did not intend § 105 to apply to actions pending on the date of its enactment. As such, it appears to be unnecessary to consider whether the law would have retroactive effect.

However, the retroactive question has been dealt with in differing fashions throughout the various courts. *Compare* ***Jeffries v. Wood***, 83 F.3d 1142 (9th Cir.1996)(Amendments in Title I of the Act do not apply to cases filed in federal court prior to Act's effective date); ***United States v. Lopez***, 100 F.3d 113(10th Cir.1996)(same); ***Boria v. Keane***, 90 F.3d 36 (2d Cir.1996)(AEDPA provides no indication that Congress intended it to apply to pending non-capital cases); *with* ***Hunter v. United States***, 101 F.3d 1565 (11th Cir.1996)(AEDPA applied to 2255 cases in which no notice of appeal was filed before effective date); ***United States v. Orozco***, 1996 WL 742530, __F.3d__, (5th Cir. December 31, 1996)(AEDPA applied to 2255 proceedings pending when AEDPA took effect).

As the Seventh Circuit, in the case at bar, decided that the certificate of appealability requirements of the AEDPA were applicable to Petitioner, even though her original petition was filed prior to the enactment of the AEDPA, and given the differing interpretations from other Circuits, Petitioner seeks a decision which determines whether the provisions of the AEDPA are to be applied retroactively.

While not directly related to Petitioner's case, it is also requested that this Honorable Court examine the issue of retroactivity as it pertains to the AEDPA as a whole. Specifically, how is the AEDPA to impact those inmates who were imprisoned prior to the enactment date and never filed any Habeas petitions and/or Motions pursuant to 28 U.S.C. § 2255.

The question appears to center around three possible alternative applications. First, as the AEDPA places new restrictions on the filing of post-conviction motions, should such restrictions even be imposed upon the above-described individuals at all. The second alternative would allow those inmates who's case were finalized well before the enactment of the AEDPA to file motions within a reasonable time period from the date of enactment. This would require a ruling which sets out, specifically, the time frame applicable to said persons. The third alternative would be to give the AEDPA total retroactive impact, thereby denying such individuals any bastion of hope for any post-conviction relief based solely on a failure to bring forth their respective issues within the one-year limitations set out in the AEDPA.

As the retroactive issue, as a whole, is of great concern to both those incarcerated and those representing them, it respectfully submitted that this issue be addressed along with the issues directly relating to Petitioner's case.

---------- ♦ ----------

CONCLUSION

Petitioner hereby respectfully moves this Honorable Court to approve his application for certiorari.

Respectfully submitted,

Arthur L. Wallace
Attorney for Petitioner

App. 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA

v.

MARINA ZARNES
(Name of Defendant)

FILED
SEP 19 1990
John M. Waters, Clerk
U.S. District Court
Central District of Illinois

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

Case Number: 89-30070 (05)

Michael Vonnahmen
Defendant's Attorney

THE DEFENDANT:
( ) pleaded guilty to count(s) _____
(xx) was found guilty on count(s) 1
after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title/Sect	*Nature of Offense*	*Count Number(s)*
T. 21, Sec. 846	***Conspiracy to Manufacture and Distribute Methamphetamine (Over 100 grams of Pure Methamphetamine)***	*1*

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐The defendant has been found not guilty on count(s) ____ and is discharged as to such count(s).

☐Count(s) _____ (are) dismissed on the motion of the United States.

☐The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

☒It is ordered that the defendant shall pay a special assessment of $50, for count(s) One, which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
350-42-4530

September 10, 1990
Date of Imposition of Sentence

Defendant's Mailing Address:
% U.S. Marshal's Office
Springfield, IL 62701

/s/ Richard Mills
Signature of Judicial Officer

Richard Mills, U.S. District Judge
Name & Title of Judicial Officer

Defendant's residence address:
% U.S. Marshal's Office
Springfield, IL 62701

September 10, 1990
Date

Defendant: Marina Zarnes Judgment--Page 2 of 4
Case Number: 89-30070 (05)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 120 months.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[x] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at _____ a.m./p.m. on _____.

[ ] As notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

[ ] before 2:00 p.m. on _____.

[ ] As notified by the United States Marshal.

[ ] As notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

A True Copy
ATTEST:
John M. Waters, Clerk
By: Pamela E. Robinson
Deputy Clerk
U.S. District Court
Central District of Illinois
Date: Sept. 10, 1990

_____
UNITED STATES MARSHAL
By:_____
Deputy Marshal

Defendant: Marina Zarnes Judgment--Page 3 of 4
Case Number: 89-30070 (05)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

( ) The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

1. That the defendant not commit any local, state or federal crimes;
2. That the defendant shall abide by the standard conditions of supervised release;
3. That the defendant shall not possess any firearm or any other dangerous weapon;
4. That the defendant shall participate in a program approved by the U.S. Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs.

Defendant: Marina Zarnes Judgment--Page 4 of 4
Case Number: 89-30070 (05)

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1. The defendant shall not commit another Federal, state or local crime;
2. The defendant shall not leave the judicial district without the permission of the court or probation officer;
3. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
4. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
5. The defendant shall support his or her dependents and meet other family responsibilities;
6. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
7. The defendant shall notify the probation officer within 72 hours of any change in residence or employment;
8. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by physician;
9. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

10. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
11. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
12. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
13. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
14. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

United States Court of Appeals *jmp*

For the Seventh Circuit
Chicago, Illinois 60604

September 30, 1996

Before
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

MARINA ZARNES, Petitioner-Appellant,	]	Appeal from the United States District Court for the Central District of Illinois, Springfield Division.
No. 96-2686 v.	]	
UNITED STATES OF AMERICA, Respondent-Appellee.	]	No. 96 C 3090
	]	Richard Mills, Judge

Petitioner moved to vacate, correct, or set aside a sentence pursuant to 28 U.S.C. 2255. The district court denied the petition and declined to issue a certificate of appealability. Petitioner now has filed a notice of appeal which we shall construe as an application for a certificate of appealability. Fed. R. App. P. 22(b); Circuit Rule 22.1.

This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. 28 U.S.C. 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA	:	
Appellee,	:	**CASE NO. 96-2686**
vs.	:	
MARINA ZARNES,	:	
Appellant.	:	

MOTION FOR RECONSIDERATION ON CERTIFICATE OF APPEALABILITY

COMES NOW, Counsel, on behalf of the above-referenced individual, and sets forth the following information on why this court should both reconsider and reinstate the Certificate of Appealability for Petitioner, Marina Zarnes.

The Antiterrorism and Effective Death Penalty Act of 1996 revised Habeas Corpus proceedings in April of 1996. Hidden in the Antiterrorism Act of 1996 were amendments to Federal Habeas Corpus relief for Federal prisoners pursuant to 28 U.S.C. 2255. The law created a new one year period of limitation that runs from the latest date of:

(1) the date which judgment of conviction becomes final;

(2) the date in which the impediment to making a motion created by governmental action in violation of U.S. laws or the Constitution is removed, if Movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; and

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

In plain language, this meant that while in the past 2255 motions could be made at any time, there were now to be restrictions concerning same. The problem is that Petitioner filed a Habeas Corpus pursuant to 28 U.S.C. 2255 before the enactment of the Antiterrorism Act of 1996 and its incumbent Habeas Corpus Reform Act. Thus to deprive the Petitioner of an opportunity to appeal, or to even require a Certificate of Appealability, both provisions within the contents of this Act would violate a number of constitutional safeguards, including, but not limited to *ex post facto*, Bill of Attainer, and the possibility that it violates the Suspension Clause of Article I, Section 9 Clause of the Tenth Amendment of the United States Constitution.

The Act made no reference to an internal effective date, or its applicability, in a retroactive capacity.

Before the enactment of the Antiterrorism Act, the only limitation on filing was a prisoner's delay that prejudiced the government's ability to respond to the motion. Fed.R.Gov. Section 2255 Proc. 9(a). This very provision itself may be

unconstitutional. The Suspension Clause of the United States Constitution provides that, *"the privilege of the Writ of Habeas Corpus shall not be suspended unless when in cases of rebellion or an invasion and the public safety may require it."* U.S. Constitution, Article I, Section 9, Clause 2. The Supreme Court has interpreted the clause as requiring that any modern post-conviction remedy that displaces Habeas Corpus, such as 2255, must afford protection *"exactly commensurate"* with the Great Writ. ***Hill v. United States***, 368 U.S. 424, 427 (1962), see ***United States v. Hayman***, 342 U.S. 205 (1952), and ***United States v. Smith***, 331 U.S. 469, 475 (1947). One of the attributes of Habeas Corpus, as recognized by the Supreme Court, is the absence of any statute of limitations and the inapplicability of the laches doctrine. ***Heflin v. United States***, 358 U.S. 415, 420 (1959) (separate opinion of Stewart, J., before five Justices, concurring). Obviously the one year added to the 2255 proceedings is a statute of limitations.

The Supreme Court has concluded that a statute of limitations cannot apply retroactively to bar actions existing at the time the statute is passed without violating due process. 17 U.S. (Wall) 599 (1873), ***United States v. Lindsay***, 346 U.S. 568, 570 (1953).

The Habeas Reform Act did not include any provisions for retroactivity, therefore, those individuals whose claims occurred prior to April of 1996 must be construed under the old law in order to violate due process rights and *ex post facto*.

WHEREFORE, Petitioner believes that this Honorable Court should entertain the appeal of the complaint as filed as no *Certificate of Appealability* is applicable to the law in place at the time in which Petitioner's complaint was filed.

Additionally, Petitioner's claim has substantial a constitutional question of law that needs to be redressed by the Appellate Court.

DATED: February 17, 1997.

Respectfully submitted,

Marcia G. Shein
Attorney at Law
Law Office of Marcia G. Shein, P.C.
52 Executive Park South
Suite 5203
Atlanta, GA 30329
(404) 633-3797

CERTIFICATE OF SERVICE

I hereby certify that I have this date mailed a copy of the foregoing to the Assistant United States Attorney, David Risley, 600 East Monroe, Room 312, Springfield, Illinois, 62701, by depositing a copy of same in the United States Postal Service with adequate postage affixed thereon to insure its delivery.

This 6th day of November, 1996.

Marcia G. Shein, Esquire
Georgia Bar No. 639820
ABA No. 17893125

Law Office of Marcia G. Shein, P.C.
52 Executive Park South
Suite 5203
Atlanta, Georgia 30329
(404) 633-3797

United States Court of Appeals *er*

For the Seventh Circuit
Chicago, Illinois 60604

November 22, 1996

Before
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

MARINA ZARNES, Petitioner-Appellant, for	]	Appeal from the United States District Court
	]	the Central District of
No. 96-2686 v.	]	Illinois, Springfield
	]	Division.
UNITED STATES OF AMERICA, Respondent-Appellee.	]	No. 96 C 3090
	]	Richard Mills, Judge

Upon consideration of the **"MOTION FOR RECONSIDERATION OF CERTIFICATE OF APPEALABILITY"** filed on November 13, 1996, by counsel for the petitioner,

IT IS ORDERED that the motion is **DENIED.**

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

UNITED STATES OF AMERICA,	]	
	]	
Plaintiff,	]	Civil No. 96-3090
	]	Crim. No. 89-30070
v.	]	
	]	FILED
MARINA ZARNES,	]	May 28, 1996
	]	John M. Waters, Clerk
	]	U.S. District Court
Defendant.	]	Central District of Illinois

ORDER

RICHARD MILLS, District Judge:

This cause is before the Court on Defendant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence.

This is the Court's preliminary consideration of this matter pursuant to Rule 4 of the Rules Governing Proceedings in the United States District Courts Under 28 U.S.C. § 2255, which provides: "If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in district court, the judge shall make an order for its summary dismissal and cause the movant to be notified."

A jury found Marina Zarnes guilty of conspiring to manufacture and distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1). The Court sentenced Zarnes to 120

months imprisonment. The conviction and sentence were affirmed. United States v. Zarnes, 33 F.3d 1454 (7th Cir. 1994).

In the instant motion, Zarnes raises six grounds for relief. She asserts ineffective assistance of counsel as both a substantive ground for relief and as cause for her failure to raise other grounds on appeal. In addition to ineffective assistance, Zarnes raises issues related to an upward departure[1], calculation of the weight of methamphetamine involved, relevant conduct, double jeopardy, and sufficiency of the evidence.

II. ANALYSIS

A. Double Jeopardy and Sufficiency of the Evidence

Two of the issues Zarnes now raises were raised on appeal: double jeopardy and sufficiency of the evidence. The Seventh Circuit found no double jeopardy violation, 33 F.3d at 1470-71, and concluded that ample evidence supported Zarnes' conviction. 33 F.3d at 1465-66. Zarnes offers no reason why this Court should ignore the Seventh Circuit's rulings on these issues. Therefore, the Court will not address Zarnes' double jeopardy and sufficiency of the evidence claims.

---

[1] It is unclear what Zarnes means by upward departure. It does not appear from the record that the Court upwardly departed at sentencing. Perhaps Zarnes means to challenge the Court's application of the mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A)(viii).

B. Sentencing Issues

Zarnes did not raise her claims related to the upward departure, the Court's calculation of the weight of methamphetamine involved, and proof of relevant conduct on appeal. Therefore, Zarnes must establish cause and prejudice before the Court may hear those claims.

In order to warrant collateral relief in a § 2255 proceeding on an issue wh ch a petitioner failed to raise at trial or on direct appeal, the petitioner must show good cause excusing her failure to raise such issues at the proper time and actual prejudice resulting from the errors of which she complains. United States v. Frady, 456 U.S. 152, 166 (1982). The Court construes Zarnes' ineffective assistance of counsel claim as an assertion of cause for failure to raise issues on appeal.

To establish ineffective assistance of counsel, a defendant must show that counsel performed in a deficient manner and that counsel's deficient performance prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687 (1984). A court need not address counsel's performance first, but may proceed directly tot he prejudice inquiry. Id. at 697. The prejudice standard is quite high: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." Id. at 694; see also United States v. Delgado, 936 F.2d 303, 310 (7th Cir. 1991) (setting forth the standard for reviewing claims of ineffective assistance), cert. denied, 502 U.S. 1072 (1992). A defendant must also show that counsel's errors rendered "the proceedings . . . fundamentally unfair or unreliable . . . ." Lockhart v. Fretwell, 113 S.Ct. 838 (1993). The Seventh Circuit has also

made it abundantly clear that when ineffective assistance claims relate to the length of the sentence imposed, prejudice requires a significant impact on the length of the sentence. See Durrive v. United States, 4 F.3d 548, 551 (7th Cir. 1993); cf. Scott v. United States, 997 F.2d 340 (7th Cir. 1993) (suggesting that defendants cannot complain collaterally about their sentences so long as they fall within the statutorily permissible range).

The Court will not evaluate the reasonableness of Zarnes' attorney's performance because Zarnes cannot show that she was prejudiced by her attorney's alleged ineffectiveness. Defendant asserts several errors by counsel:

> The attorney never really prepared for the trial by interviewing witnesses for either side. The attorney did not represent me during sentencing adequately regarding prior criminal history, relevant conduct, weight, and upward departure. The attorney never adequately defended me to get me out on bail. I was held in segregation for along [sic] time, beat up by another inmate and certainly was not emotionally able to attend trial. The facts that most of the evidence was regarding the codefendant in activities that were not connected to her, prejudiced the jury against her and there were not instructions to the jury that would overcome the prejudice. The defendant should have been tried separate and only for her conduct and not what the others did separate and apart from anything she was remotely connected with.
>
> The defendant had already been tried in State Court for the same offense and this constituted double jeopardy. The charges should have been dismissed

on the violation of the Fifth amendment rights guaranteed by the double jeopardy clause.

All of these are direct evidence of ineffective assistance of counsel.

1. Lack of Preparation

Zarnes claims that her attorney failed to adequately prepare for trial. Zarnes does not suggest how additional preparation would have altered the outcome of the trial. See Resnover v. Pearson, 965 F.2d 1453, 1460-61 (7th Cir. 1992) (stressing that a habeas petitioner must establish that if counsel had prepared more thoroughly, the result would have been different), cert. denied sub nom. Resnover v. Carter, 508 U.S. 962 (1993). The evidence of Zarnes' guilt was substantial, and it is unlikely that additional preparation would have yielded a different result.

2. Sentencing

Zarnes' second group of claims relates to sentencing. Any prejudice that Zarnes suffered as a result of her attorney's failure to press all possible issues on sentencing does not rise to the requisite magnitude. See Durrive v. United States, 4 F.3d 548, 551 (7th Cir. 1993). Zarnes received the mandatory minimum sentence for her crime. At the time of sentencing, the Court found Zarnes responsible for 100 grams of pure methamphetamine based on the PSR and the trial testimony.[2] Under 21 U.S.C. §841(b)(1)(A)(viii), the

---

[2] The Government requested a finding that the conspiracy Zarnes was convicted of involved more than 100 grams of pure methamphetamine. The Government referred

Court was required to sentence Zarnes to at least 10 years imprisonment. The Court imposed the minimum sentence allowed by law. Therefore, Zarnes' attorney could have done nothing to reduce the sentence she received.

3. Separate Trial

Zarnes complains that her attorney did not attempt to have Zarnes tried separately form her codefendants. Zarnes does not suggest, and the Court cannot find, that Zarnes would have been any less likely to have been convicted in a separate trial. The evidence against Zarnes was sufficient to convict her. The jury was properly instructed to consider the guilt or innocence of each defendant. Therefore, Zarnes cannot demonstrate prejudice as a result of counsel's failure to request severance.

4. Pretrial Detention

Zarnes objects that her attorney did not try hard enough to get her released on bond pending trial. Zarnes has not suggested that the outcome of the proceedings would have been any different if she had been released pending trial. See Strickland, 466 U.S. at 694 (holding that to show prejudice as a result of an attorney error, a petitioner must establish that

---

to paragraph 42 of the PSR, which held Zarnes responsible for 907.2 grams of methamphetamine. Based on the trail testimony regarding the purity of the methamphetamine, the Government urged the Court to conclude that the 907.2 grams listed in paragraph 42 included at least 100 grams of pure methamphetamine. The court adopted the Government's position.

the result of the proceeding would have been different but for that error).

5. Double Jeopardy

Zarnes' final claim of attorney error is that her attorney did not get the case dismissed on double jeopardy grounds. As the Court has already noted, a double jeopardy claim would have been meritless. Therefore, Zarnes suffered no prejudice as a result of her attorney's failure to pursue it. See Steward v. Gilmore, 80 F.3d 1205, 1212 (7th Cir. 1996) (concluding that failure to make a meritless claim "could not possibly constitute ineffective assistance of counsel."

Because Zarnes has not shown that any of her attorney's alleged errors caused any prejudice, she cannot establish ineffective assistance of counsel. Therefore, she is barred from presenting her procedurally defaulted claims in this collateral proceeding.

IV. CONCLUSION

For the foregoing reasons, it plainly appears from the face of the motion and the prior proceedings in this case that Zarnes is not entitled to relief.

Ergo, Defendant's Motion to Vacate, Set Aside, or Correct Sentence (d/e 682) is DENIED.

ENTER: 24 May, 1996.

FOR THE COURT:

/s/ Richard Mills
RICHARD MILLS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

UNITED STATES OF AMERICA,

v.

MARINA ZARNES

Application to Proceed In Forma Pauperis, Supporting Documentation And Order

Case Number: 89-30070

I, Marina Zarnes, declare that I am the (check appropriate box)

___ petitioner/plaintiff
___ respondent/defendant
_XX_ movant (filing 28 U.S.C. 2255 motion)
___ _____
Other

in the above-entitled proceeding; that, in support of my request to proceed without being required to prepay fees, cost or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or give security therefor; that I believe I am entitled to relief. The nature of my action, defense, or other proceeding or the issues I intend to present on appeal are briefly stated as follows:

Ineffective assistance of counsel
Upward departure
Weight disparity
Relevant conduct

Double jeopardy
Insufficient evidence to convict on conspiracy

In further support of this application, I answer the following questions.

1. Are you presently employed? Yes ___ No ___
   a. If the answer is "yes", state the amount of your salary or wages per month and give the name and address of your employer. (List both gross and net salary)

   b. If the answer is "no", state the date of last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any money from any of the following sources?

   a. Business, profession or other form of self-employment? Yes __ No __
   b. Rent payments, interest or dividends? Yes __ No __
   c. Pensions, annuities or life insurance payments? Yes __ No __
   d. Gifts or inheritances? Yes __ No __
   e. Any other sources? Yes __ No __

MOTION UNDER 28 U.S.C. 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	District Central District Of Illinois Springfield Division	
Name of Movant	Prisoner No.	Docket No.
Marina Zarnes	19303-198	89-30070

Place of Confinement Unit F FCI Dublin 5701 8th Street Camp Parks Dublin, CA 94568

(Include name upon which convicted)
UNITED STATES OF AMERICA v. MARINA ZARNES
(Full name of movant)

MOTION

1. Name and location of court which entered the judgment of conviction under attack: U.S. District Court Central District of Illinois; Springfield Division; P.O. Box 315 Springfield, Illinois 62705

2. Date of judgment of conviction: September 10, 1990

3. Length of sentence: 120 months

4. Nature of offense involved (all counts): T 21, Sec. 846 Conspiracy to Manufacture and Distribute Methamphetamine (Over 100 grams of Pure Methamphetamine)

5. What was your plea? (Check one)
   (a) Not Guilty ☒
   (b) Guilty ☐

(c) Nolo Contendo ☐

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

_____

_____

6. Kind of trial: (check one)
   (a) Jury ☒
   (b) Judge Only ☐

7. Did you testify at the trial?
   Yes ☐ No ☒

8. Did you appeal from the judgment of conviction?
   Yes ☒ No ☐

9. If you did appeal, answer the following:

   (a) Name of court Seventh Circuit Court of Appeals
   (b) Result Affirmed
   (c) Date of result August 29, 1994

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?

    Yes ☐ No ☒

11. If your answer to (10) was "yes", give the following information:
    (a) (1) Name of court _____
        (2) Nature of proceeding _____

_____

(3) Grounds raised _____

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☒

(5) Result _____

(6) Date of result _____

(b) As to any second petition, application or motion give the same information:

(1) Name of the court _____

(2) Nature of proceeding _____

_____

(3) Grounds raised _____

_____

(4) Did you receive an evidentiary hearing on your petition, application, or motion?
Yes ☐ No ☒

(5) Result _____

(6) Date of result _____

(c) As to any third petition, application or motion, give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

_____

(3) Grounds raised _____

_____

(d) Did you appeal, to an appellate court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☐ No ☐
(2) Second petition, etc. Yes ☐ No ☐
(3) Third petition, etc. Yes ☐ No ☐

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not?

_____
_____
_____

12. State concisely every ground on which you claim that you are being held unlawfully. Summerize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: *If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.*

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground One: INEFFECTIVE ASSISTANCE OF COUNSEL

Supporting FACTS (tell your story *briefly* without citing cases or law): The attorney never really prepared for the trial by interviewing witnesses for either side. The attorney did not represent me during sentencing adequately regarding prior criminal history, relevant conduct, weight, and the upward departure. The attorney never adequately defended me to get me out on bail. I was held in segregation

for along time, beat up by another inmate and certainly was not emotionally able to SEE 4(a)

B. Ground Two: UPWARD DEPARTURE

Supporting FACTS (tell your story *briefly* without citing cases or law): When a court does an upward departure he must find factual findings to justify the reason for departing from the guidelines. In this case there was not justification and the defendant should be resentenced under the guidelines.

C. Ground Three: WEIGHT DISPARITY

Supporting FACTS (tell your story *briefly* without citing cases or law): There has been many changes in how the courts are to determine the weight of Methamphetamine. There must be scientific findings regarding the type of methamphetamine in order to correctly determine the weight. If this is not done than the court must give the benefit of the most lenient type. There has been also recent decisions on the chemicals and how they are to be figured.

D. Ground Four: RELEVANT CONDUCT

Supporting FACTS (tell your story *briefly* without citing cases or law): The testimony of co-conspirators are not to be given as evidence without supporting documentations or evidence to support the testimony. Especially the testimony of a co-conspirator that is going to benefit from his testimony even if he lies. In this case the whole weight charged to this defendant was based on co-conspirators testimony. See 5(a) for balance of grounds.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them:

    Ineffective assistance of counsel is best heard on a Title 28 §2255 Habeas Corpus Motion rather than a direct appeal since some of the evidence will come outside the record. All of the other grounds are a direct result of ineffective assistance of counsel.

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?

    Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

    (a) At preliminary hearing: Michael H. Vonnahmen, 1414 South Fifth Street, Springfield, Illinois 62703

    (b) At arraignment and plea: Michael H. Vonnahmen, 1414 South Fifth Street

    (c) At trial: Michael H. Vonnahmen, 1414 South Fifth Street, Springfield, Illinois 62703

    (d) At sentencing: Michael H. Vonnahmen, 1414 South Fifth Street, Springfield, Illinois 62703

    (e) On appeal: Michael H. Vonnahmen, 1414 South Fifth Street, Springfield, Illinois 62703

(f) In any post-conviction proceeding: _____

_____

(g) On appeal from any adverse ruling in a post-conviction proceeding: _____

_____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

_____

(b) Give date and length of the above sentence: _____

_____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☒

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

Signature of Attorney, if any

I declare under penalty of perjury that the foregoing is true and correct. Executed on

/s/ Marina Zarnes
(date)
3-25-96

/s/ Marina Zarnes
Signature of Movant

attend trial. The facts that most of the evidence was regarding the codefendant in activities that were not connected to her, prejudiced the jury against her and there were not instructions to the jury that would over come the prejudice. The defendant should have been tried separate and only for her conduct and not what the others did separate and apart from anything she was remotely connected with.

The defendant had already been tried in State Court for the same offense and this constituted double jeopardy. These charges should have been dismissed on the violation oft he Fifth Amendment rights guaranteed by the double jeopardy clause.

All of these are direct evidence of ineffective assistance of counsel.

RELEVANT CONDUCT CONTINUED

The recent laws has stated that a person does withdraw from the conspiracy after they have been incarcerated. I was still being charged with the drugs even after I told the parties I wanted no part of their drug business and even after I was incarcerated. These drugs should not be contributed to me. It would make a big difference in my offense level and shorten my sentence.

E. Grounds Five: DOUBLE JEOPARDY

FACTS: The state had already prosecuting the defendant on the exact same charges which constitutes a violation of the Fifth Amendment clause on Double Jeopardy.

F. Grounds Six: INSUFFICIENT EVIDENCE TO CONVICT ON A CONSPIRACY

FACTS: The evidence needed to convict a person on a conspiracy contain these elements: (1) An Agreement; (2) knowledge of objective (3) knowing and voluntary participation (4) interdependence. In this case it was a pure buy/sell agreement between the defendant and the other codefendants. The codefendants. The codefendants operated separately from the defendant. The elements of the crime were not proven at trial. The defendant was not a part of the overall conspiracy.

(2)

Supreme Court, U.S.
FILED
APR 28 1997
OFFICE OF THE CLERK

No. 96-1324

In The

Supreme Court of the United States

October Term, 1996

MARINA ZARNES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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Lutz Appellate Services, inc.

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PRELIMINARY STATEMENT

Petitioner has requested that this Honorable Court review three areas of her case. The issues submitted are as follows:

A. **The United States Court of Appeals for the Seventh Circuit has rendered a decision that is in conflict with the decisions of the United States Supreme Court, thereby calling for the exercise of the Supreme Court's supervisory power.**

B. **The exercise of the Supreme Court's supervisory power is requested to determine whether the provisions of the AEDPA, relating to §2255 Petitions, are violative of the United States Constitution.**

C. **The exercise of the Supreme Court's supervisory power is requested to determine if the provisions of the AEDPA, relating to §2255 Petitions, are subject to retroactive application.**

Petitioner respectfully submits that this Supplemental Brief provides further case law, from various Circuits, dealing with the positions previously submitted in the third issue listed above.

Furthermore, as this Court has already granted the Petition of Certiorari in the case of ***Lindh v. Murphy***, 96 F.3d 856 (7th Cir.1996)(en banc), ***cert. granted***, 117 S.Ct. 726, 136 L.Ed.2d 643 (1997), which deals significantly on the issues raised by Petitioner, it is respectfully requested that the present petition be granted and reviewed along with the above-referenced case.

ARGUMENT

As set out in the original Petition, the Seventh Circuit, decided that the certificate of appealability requirements of the AEDPA were applicable to Petitioner, even though her original petition was filed prior to the enactment of the AEDPA. Given the differing interpretations from other Circuits, Petitioner seeks a decision which determines whether the provisions of the AEDPA are to be applied retroactively.

Along with the cases already submitted, Petitioner respectfully submits the following cases in support of the differing interpretations of the retroactive application of the provisions in the AEDPA.

Williams v. Calderon, 83 F.3d 281 (9th Cir.1996), where the Ninth Circuit assumed, without deciding, that § 2253(c)(2) of the Act does not apply

retroactively. This position was based on an interpretation that the restrictions only apply to capital cases. ***Williams***, 83 F.3d at 286, n.2.

Also, compare ***Lyons v. Ohio Adult Parole Authority, et al.***, 105 F.3d 1063 (6th Cir.1997) with ***Martin v. United States***, 96 F.3d 853 (7th Cir.1996). In both cases, the petitioners sought habeas relief and had submitted notices of appeal, through the prisons, to the court prior to the enactment of the AEDPA. In both cases, the district court had not issued a certificate of probable cause. In ***Martin***, the Seventh did not apply the new restrictions retroactively. However, the Sixth Circuit, in ***Lyons***, found that the new restrictions were retroactive, and should have been applied.

Also, as previously submitted, it is requested that this Honorable Court examine the issue of retroactivity as it pertains to the AEDPA as a whole. Specifically, how is the AEDPA to impact those inmates who were imprisoned prior to the enactment date and never filed any Habeas petitions and/or Motions pursuant to 28 U.S.C. § 2255.

There appear to be three possible alternative applications, to wit: (i) as the AEDPA places new restrictions on the filing of post-conviction motions, the "new" restrictions should not be imposed upon the above-described individuals at all; (ii) allow those inmates who's case were finalized before the enactment of the AEDPA to file motions within a reasonable time

period from the date of enactment. This would require a ruling which sets out, specifically, the time frame applicable to said persons; and (iii) give the AEDPA total retroactive impact, thereby denying such individuals any hope of any post-conviction relief based solely on a failure to bring forth their respective issues within the one-year limitations set out in the AEDPA.

As to the first-listed alternative, Petitioner respectfully submits the following case:

Reyes v. Keane, 90 F.3d 676 (2d Cir.1996) (AEDPA's one-year statute of limitations not applied to §2254 petitions where one-year period expired before effective date of Act).

As to the second alternative mentioned above, Petitioner respectfully submits the following cases for examination:

Peterson v. Demskie, __F.3d__, 1997 U.S. App. LEXIS 2297 (2d Cir. February 5, 1997);

Lindh v. Murphy, 96 F.3d 856 (7th Cir.1996)(en banc), ***cert. granted***, 117 S.Ct. 726, 136 L.Ed.2d 643 (1997).

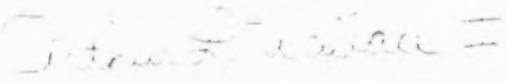
Again, as the retroactive issue, as a whole, is of great concern to both those incarcerated and those representing them, it respectfully submitted that this

issue be addressed along with the issues directly relating to Petitioner's case.

CONCLUSION

Petitioner hereby respectfully re-submits the request that this Honorable Court to approve this application for certiorari.

Respectfully submitted,



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Supreme Court, U.S.
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CLERK

No. 96-1324

In the Supreme Court of the United States

OCTOBER TERM, 1996

MARINA ZARNES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the amendment made by Section 102 of the Antiterrorism and Effective Death Penalty Act of 1996, requiring prisoners to obtain a certificate of appealability before they may appeal from a district court's denial of a motion under 28 U.S.C. 2255, applies to cases in which the motion was filed before the effective date of the Act, but the notice of appeal was filed after the effective date of the Act.

2. Whether the court of appeals correctly denied a certificate of appealability to petitioner.

3. Whether the certificate-of-appealability provisions are constitutional as applied to petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1324

MARINA ZARNES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment orders of the court of appeals (Pet. App. 7, 13) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1996. Pet. App. 7. A motion for reconsideration was denied on November 22, 1996. Pet. App. 13. The petition for a writ of certiorari was filed on February 20, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

[1] The petition for a writ of certiorari was filed more than 90 days after the denial of petitioner's motion for a certificate of appealability, but less than 90 days after the denial of her motion for reconsideration in the court of appeals. See Rule 13.3 of the Rules of this Court.

STATEMENT

Following a jury trial in the United States District Court for the Central District of Illinois, petitioner was convicted on one count of conspiring to manufacture and to distribute methamphetamine, in violation of 21 U.S.C. 846. She was sentenced to 120 months' imprisonment, to be followed by five years' supervised release. See 21 U.S.C. 841(b)(1)(A)(viii). The court of appeals affirmed, and this Court denied certiorari. *United States* v. *Zarnes*, 33 F.3d 1454 (7th Cir. 1994), cert. denied, 115 S. Ct. 2286 (1995). Petitioner then filed a motion to vacate her conviction and sentence under 28 U.S.C. 2255. The district court denied the motion. The court of appeals denied a certificate of appealability and dismissed the appeal.

1. Petitioner was a member of a large-scale methamphetamine conspiracy operating in California and Illinois. As the court of appeals explained in rejecting petitioner's challenge to the sufficiency of the evidence on direct appeal, she "played a crucial role in the early stages of the conspiracy as the * * * dependable supplier of methamphetamine." 33 F.3d at 1465. After an initial sale of methamphetamine in 1987, petitioner and her co-conspirators "set about to standardize their future dealings with one another" and engaged in several additional transactions and telephone conversations during 1988. *Ibid.* Tape-recorded conversations "indicated that the relationship between [petitioner] and [her co-conspirators] was a cooperative and mutually beneficial one." *Id.* at 1466.

2. On April 4, 1996, petitioner filed a motion to vacate her conviction and sentence under 28 U.S.C. 2255 (1994). Pet. App. 24-34. She raised six grounds

for relief, including claims that her counsel did not provide effective assistance under *Strickland* v. *Washington*, 466 U.S. 668 (1984); that her conviction violated the Double Jeopardy Clause; that the evidence was insufficient to support the jury's verdict; that the district court miscalculated the purity of the methamphetamine involved in the case; that the court improperly departed upward from the sentencing range established by the Sentencing Guidelines (although the court did not in fact depart); and that the court misapplied the "relevant conduct" principles of Guidelines § 1B1.3. See Pet. App. 15 & n.1.

On May 28, 1996, the district court filed its order denying petitioner's motion. The court rejected her double jeopardy and sufficiency-of-the-evidence claims on the ground that the court of appeals had already reviewed and rejected those claims on direct appeal. As petitioner had not raised her sentencing claims on direct appeal, however, the court held that she could not raise them on collateral review without a showing of "cause and prejudice" for the procedural default. Pet. App. 16 (citing *United States* v. *Frady*, 456 U.S. 152, 166 (1982)). Construing petitioner's *Strickland* claim both "as an assertion of cause for failure to raise [the sentencing] issues on appeal," *ibid.*, and as an independent claim of error, the court concluded that no relief was warranted because petitioner "has not shown that any of her attorney's alleged errors caused any prejudice," *id.* at 21. The court explained that it had found petitioner responsible for more than 100 grams of pure methamphetamine, which triggered the ten-year mandatory minimum sentence under 21 U.S.C. 841(b)(1)(A)(viii), based on a finding that petitioner was responsible for a gross amount of 907.2 grams of methamphetamine. Pet. App. 18 & n.2.

The court explained that "[t]herefore, [petitioner's] attorney could have done nothing to reduce the sentence she received." *Id.* at 19. Petitioner filed a notice of appeal on June 11, 1996. District Court Case No. 89-30070, Docket No. 688.

3. On April 24, 1996, while petitioner's motion was pending in the district court, the President signed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, into law. Title I of the Act made changes to the law governing motions for collateral relief for federal prisoners under 28 U.S.C. 2255. The amendments made by Section 102 of the Act to 28 U.S.C. 2253 require a "certificate of appealability" before a prisoner may appeal from a district court's denial of his motion. The new provision states that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from * * * the final order in a proceeding under section 2255." 110 Stat. 1217 (to be codified at 28 U.S.C. 2253(c)(1)(B)).[2]

4. On July 3, 1996, the district court denied petitioner a certificate of appealability. District Court Case No. 89-30070, Docket No. 690. On September 30, 1996, the court of appeals denied petitioner a certificate of appealability and dismissed her appeal. Pet. App. 7. A motion for reconsideration was denied by the court of appeals on November 22, 1996. *Id.* at 13.

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[2] A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." AEDPA § 102, 110 Stat. 1217-1218 (to be codified at 28 U.S.C. 2253(c)(2)). The certificate must "indicate which specific issue or issues satisfy the showing required." *Ibid.* (to be codified at 28 U.S.C. 2253(c)(3)).

ARGUMENT

1. a. Petitioner contends (Pet. 15-17) that the new statutory requirement that she must obtain a certificate of appealability before appealing the denial of her Section 2255 motion does not apply in this case, because her Section 2255 motion was pending in the district court—but not on appeal—at the time that statutory requirement was enacted. That claim is without merit.

In *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), this Court addressed the circumstances under which "a federal statute enacted after the events in a suit" may be applied to a pending case. *Id.* at 280. Under *Landgraf*, "the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach." *Ibid.* When Congress issues a clear statement regarding the statute's applicability to pending cases, that statement controls. *Ibid.* "When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Ibid.* If a statute that lacks a clear statement would operate retroactively, it may not be applied retroactively.[3]

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[3] "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment." *Landgraf*, 511 U.S. at 269. "Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 269-270. That question may be answered by considering "the nature and extent of the change in the law and the degree of

Under the *Landgraf* analysis, however, procedural rules are generally not "retroactive," even if applied to lawsuits involving conduct that was completed before the rule was promulgated. 511 U.S. at 275. Because procedural rules regulate conduct in litigation, rather than primary conduct of the parties outside the litigation context, litigants have "diminished reliance interests in matters of procedure." *Ibid.* Thus, "the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive." *Ibid.*

For example, in *Thorpe* v. *Housing Authority*, 393 U.S. 268 (1969), this Court held that "an agency circular requiring a local housing authority to give notice of reasons and opportunity to respond before evicting a tenant was applicable to an eviction proceeding commenced before the regulation issued" because the new hearing procedures did not affect either party's primary conduct, that is, their "obligations under the lease agreement." *Landgraf*, 511 U.S. at 276. Similarly, in *Bradley* v. *School Board*, 416 U.S. 696 (1974), this Court held that the newly enacted Section 718 of the Education Amendments of 1972, 20 U.S.C. 1671 (1976), which authorized federal courts to award reasonable attorney's fees to prevailing parties, would apply to a case pending on appeal because the attorney's fee determination was "collateral to the main cause of action" and "uniquely

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connection between the operation of the new rule and a relevant past event." *Id.* at 270.

separable from the cause of action to be proved at trial." *Landgraf*, 511 U.S. at 276-277.[4]

Section 102 of the AEDPA is a procedural change that does not violate any "vested right" under *Landgraf*. It does not define a new crime or otherwise change the significance of the prisoner's primary conduct. Nor does it change the constitutional standards governing the procedures used at the prisoner's

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[4] As this Court warned in *Landgraf*, however, "the mere fact that a new rule is procedural does not mean that it applies to every pending case." 511 U.S. at 275 n.29. Because procedural rules regulate litigation conduct, it is the time of the litigation conduct, and not the time of the primary conduct underlying the litigation, that matters for purposes of retroactivity. Therefore, retroactivity analysis of procedural rules depends "on the posture of the particular case." *Ibid.* It is our position that 28 U.S.C. 2253(c)(1)(B) does not apply in cases where the notice of appeal was filed before the effective date of the Act. That position is in accord with the published decisions of the courts of appeals that have considered the issue. See *United States* v. *Rocha*, No. 95-11229, 1997 WL 123580, at *2-*3 (5th Cir. Apr. 3, 1997) (concluding that the amended Section 2253(c) should not be applied to a Section 2255 appeal filed before the Act's effective date); *United States* v. *Lopez*, 100 F.3d 113, 116-117 (10th Cir. 1996) (same); *United States* v. *Ruth*, 100 F.3d 111, 112 n.1 (10th Cir. 1996) (same); *Herrera* v. *United States*, 96 F.3d 1010, 1011-1012 (7th Cir. 1996) (same); *Thye* v. *United States*, 96 F.3d 635, 636-637 (2d Cir. 1996) (concluding that the amended Section 2253(c) should not be applied to a Section 2255 appeal filed and briefed before the Act's effective date); compare *Naddi* v. *Hill*, 106 F.3d 275, 277 (9th Cir. 1997) (concluding that the certificate-of-appealability requirement does not apply if a habeas corpus petition by a state prisoner is filed in district court before the effective date of the Act, even if the notice of appeal is filed after that date). See also *Lozada* v. *United States*, No. 96-2887, 1997 WL 99719, at *3 n.2 (2d Cir. Mar. 7, 1997) (to be reported at 107 F.3d 1011).

trial and sentencing. Indeed, Section 102 does not even restrict the scope of relief available under Section 2255; it merely controls the availability of appellate review. Retroactivity analysis is thus controlled by the posture of the particular case at the time the legislation went into effect.

The relevant event under Section 102 is the filing of a notice of appeal. The district court in this case denied collateral relief to petitioner on May 28, 1996—one month after the amended Section 2253 was signed into law. Petitioner filed her notice of appeal on June 11, 1996. Therefore, the posture of petitioner's case rendered her appeal from the district court's final order subject to the Act, even though her Section 2255 motion was filed before the effective date of the Act. See *Lozada* v. *United States*, No. 96-2887, 1997 WL 99719, at *2-*3 (2d Cir. Mar. 7, 1997) (to be reported at 107 F.3d 1011) (applying certificate-of-appealability requirement where Section 2255 movant's notice of appeal was filed after the effective date of the Act); *United States* v. *Riddick*, 104 F.3d 1239, 1240-1241 (10th Cir. 1997) (same); *United States* v. *Orozco*, 103 F.3d 389, 391-392 (5th Cir. 1996) (same); *Hunter* v. *United States*, 101 F.3d 1565, 1573 (11th Cir. 1996) (en banc) (same), petition for cert. pending, No. 96-1443 (filed Mar. 10, 1997); see also *United States* v. *Coyle*, 944 F. Supp. 418, 419-420 (E.D. Pa. 1996); *United States* v. *Cota-Loaiza*, 936 F. Supp. 756, 758-759 (D. Colo. 1996).[5]

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[5] This Court has denied certiorari in two cases in which courts of appeals applied the new certificate-of-appealability requirement to cases that were pending in the district court on the effective date of the Act, but in which the prisoner's notice of appeal was not filed until after that date. See *England* v. *United States*, cert. denied, 117 S. Ct. 969 (1997);

b. Petitioner argues (Pet. 16) that the courts of appeals are divided on the question presented in this case. In particular, she cites *Jeffries* v. *Wood*, 103 F.3d 827 (1996) (en banc order), in which the Ninth Circuit held in a brief order that the amendments made by Title I of the Act, which include the certificate-of-appealability provisions at issue here, do not apply to "cases filed" before the Act's effective date. The order in *Jeffries* did not elucidate how that rule would apply in this case, *i.e.*, whether the relevant date for purposes of the certificate-of-appealability requirement is the date the Section 2255 motion was filed in the district court or the date the prisoner's appeal from the denial of a Section 2255 motion was filed in the court of appeals. In *Naddi* v. *Hill*, 106 F.3d 275 (1997), the Ninth Circuit held that, under *Jeffries*, the certificate-of-appealability requirement does not apply to an appeal by a state prisoner whose habeas corpus petition was filed in district court before the effective date of the Act, even though his notice of appeal was filed after that date. Thus, it appears that in cases involving state prisoners, the Ninth Circuit has departed from the majority rule. The decision in *Naddi*, however, did not involve the application of

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Travis v. *United States*, cert. denied, 117 S. Ct. 968 (1997). We have also filed a brief in opposition to certiorari in *Durham* v. *United States*, No. 96-7329, a case in the same posture that is now pending before the Court. In *Embrey* v. *United States*, No. 96-7325, the prisoner's notice of appeal was filed before the effective date of the Act, but the court of appeals nonetheless applied the certificate-of-appealability requirement and dismissed the appeal. In our brief in opposition to certiorari in *Embrey*, we stated our position that the court of appeals erred in that respect.

the certificate-of-appealability requirement to federal prisoners in petitioner's position, *i.e.*, those who filed their Section 2255 motions before the Act's effective date but who filed their notices of appeal after that date. Moreover, in *Naddi*, the district court had certified the requested issues for appeal, such that the question whether the certificate-of-appealability requirement applied had no effect on the outcome. The Seventh Circuit's decision in this case thus does not squarely conflict either with *Jeffries* or with *Naddi*.[6]

Even if a square conflict developed, however, it is not clear that the issue would warrant resolution by this Court. At present, the conflict would affect a defined set of Section 2255 cases—*i.e.*, those that were pending in the district courts, but not on appeal,

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[6] The other cases cited by petitioner do not support her claim of a conflict in the circuits. In *United States* v. *Lopez*, *supra*, the court merely held that the certificate-of-appealability provisions do not apply where the notice of appeal was filed *before* the Act's effective date; the decision has no bearing on cases, such as this one, in which the notice of appeal was filed *after* the Act's effective date. See *Riddick*, 104 F.3d at 1240-1241.

In *Boria* v. *Keane*, 90 F.3d 36 (1996), petition for cert. pending, No. 96-628 (filed Oct. 11, 1996), the Second Circuit considered only the retroactivity of the new deference provisions of the Act, § 104(3), 110 Stat. 1218 (to be codified at 28 U.S.C. 2254(d)). The retroactivity of those provisions is now pending before this Court in *Lindh* v. *Murphy*, No. 96-6298 (argued Apr. 14, 1997). See discussion at pages 12-14, *infra*. The Second Circuit has adhered to the majority view that the certificate-of-appealability provisions apply to cases in which the notice of appeal was filed after the Act's effective date. Compare *Thye*, 96 F.3d at 636-637, with *Lozada*, 1997 WL 99719, at *3 & n.2. See note 4, *supra*.

on the effective date of the Act. Even with respect to those cases, applying the certificate-of-appealability requirement will ordinarily, as here, have no effect on the outcome of cases involving constitutional claims.[7] By denying petitioner a certificate of appealability, the court of appeals determined that she had not made even "a substantial showing of the denial of a constitutional right." AEDPA § 102, 110 Stat. 1217-1218 (to be codified at 28 U.S.C. 2253(c)(2)). Because it is easier to make that showing than it is to prevail on the merits of a constitutional claim, the court of appeals' decision carries with it, *a fortiori*, a rejection of petitioner's claims on their merits. Cf. *United States* v. *Rocha*, No. 95-11229, 1997 WL 123580, at *2 n.2 (5th Cir. Apr. 3, 1997) ("[T]he showing for obtaining a [certificate of appealability] is lower than that required to prevail on the merits."). As

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[7] Petitioner raised three non-constitutional claims concerning her sentencing. A certificate of appealability may not be issued based on a non-constitutional claim. See *Lozada*, 1997 WL 99719, at *2; *United States* v. *Apker*, 101 F.3d 75 (8th Cir. 1996); *Hohn* v. *United States*, 99 F.3d 892 (8th Cir. 1996). As the district court correctly determined (Pet. App. 16), however, petitioner's procedural default of her non-constitutional claims on direct review means that she could not raise them on collateral review absent a showing of cause and prejudice. See *United States* v. *Frady*, 456 U.S. 152, 166 (1982). Petitioner's asserted "cause" in this case is her claim of ineffective assistance of counsel under *Strickland*, a purely constitutional claim that was also asserted as an independent ground for relief. See Pet. App. 16. Thus, by denying a certificate of appealability with respect to petitioner's *Strickland* claim, the court of appeals determined that her statutory sentencing claims were inexcusably defaulted and could not entitle her to collateral relief. In any event, in this Court petitioner advances only her *Strickland* claim. See Pet. 9-12.

petitioner therefore could not have succeeded on appeal in any event. Further review in this case is not warranted.

c. In *Lindh* v. *Murphy*, No. 96-6298 (argued Apr. 14, 1997), the Court granted certiorari limited to the question whether amendments to 28 U.S.C. 2254(d) that were made by the Act apply to pending habeas cases. Those amendments establish new requirements before a court may grant habeas relief to state prisoners. This case need not be held pending the Court's decision in *Lindh*, because the outcome of *Lindh* is unlikely to affect the disposition of this case.

The petitioner in *Lindh* presents two primary arguments in support of his claim that the new standards for state prisoner habeas relief do not apply to pending cases. The petitioner in *Lindh* argues that the Act itself provides that the amendments to the existing federal statutes governing collateral review of convictions should not apply to pending cases. The petitioner in *Lindh* also argues that even if the Act did not so provide, application of the *Landgraf* analysis to the Act's new standards for granting habeas relief to state prisoners leads to the conclusion that those new standards do not apply to pending cases. Even if the Court were to accept one or both of those arguments in *Lindh*, however, the result in this case would remain unaffected.

First, the petitioner in *Lindh* notes that Section 107(c) of the Act provides that "*Chapter 154* of title 28, United States Code * * * shall apply to cases pending on or after the date of enactment of this Act." 110 Stat. 1226 (emphasis added). He argues that the Act's statement that its provisions codified in *Chapter 154* of Title 28 "shall apply to cases pending" implies that its provisions codified in *Chapter 153* of

Title 28 should not apply to pending cases. Both the provision at issue in *Lindh* altering the bases for granting habeas relief for state prisoners and the provision at issue here requiring a certificate of appealability for federal prisoners are amendments to Chapter 153 of Title 28 and therefore, under the *Lindh* petitioner's argument, would not apply to pending cases. See generally 96-6298 Pet. Br. 24-40.

Even if the petitioner in *Lindh* is correct, that would not affect the analysis of this case. At most, the *Lindh* petitioner's argument regarding Section 107(c) of the Act would mean that Congress intended the certificate-of-appealability requirement, like the other amendments to provisions of Chapter 153, not to apply to "cases pending" on April 24, 1996. Because the certificate-of-appealability requirement imposes a condition on the filing of a case in the court of appeals, petitioner's argument would therefore show—at most—that that requirement does not apply to "cases pending" in the court of appeals on April 24, 1996. This case was pending in the district court—not in the court of appeals—on that date. Accordingly, this case would be unaffected by adoption of the *Lindh* petitioner's argument regarding Section 107(c). Indeed, if the *Lindh* petitioner's argument were accepted, it would draw precisely the same line that we propose regarding the application of the certificate-of-appealability requirement: that requirement would apply to cases filed in the court of appeals on or after April 24, 1996, but not to "cases pending" in the court of appeals before that date.

Second, the petitioner in *Lindh* argues that even if the Act itself contained no section regarding the application of its various provisions to pending cases, analysis under *Landgraf* yields the conclusion that

the new standards governing habeas relief for state prisoners do not apply to pending cases. See 96-6298 Pet. Br. 40-66. Acceptance of that argument, however, would also have no effect on this case. Unlike the provision at issue in *Lindh*, which alters the requirements for granting habeas relief to state prisoners, the certificate-of-appealability provision at issue in this case does not govern the circumstances under which a conviction may be collaterally attacked. Instead, the certificate-of-appealability provision governs the availability of a particular procedure—appellate review—to correct an error that a district court may have made in ruling on a Section 2255 motion. Therefore, regardless of the Court's conclusion about the proper treatment of the provision at issue in *Lindh*, the certificate-of-appealability requirement is clearly a new "procedural" rule under *Landgraf* and, as we argue above, it is applicable to cases that were already filed in the district court—but not in the court of appeals—on the effective date of the Act.

2. Petitioner argues (Pet. 9-12) that the court of appeals erred in refusing to issue a certificate of appealability in her case. A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." AEDPA § 102, 110 Stat. 1217-1218 (to be codified at 28 U.S.C. 2253(c)(2)). The court of appeals correctly found that petitioner failed to make such a showing in this case. In any event, further review would not be warranted to determine whether the court of appeals applied the statutory standard correctly to the particular facts of this case.

Petitioner asserts (Pet. 10-11) that the court of appeals should have granted a certificate of appeal-

ability with respect to the claim that her attorney was ineffective for failing to object to the "purity" of the methamphetamine involved in this case. The district court noted that its finding that petitioner's sentence should be based on her responsibility for more than 100 grams of pure methamphetamine—the amount required to trigger the mandatory minimum sentence provisions of 21 U.S.C. 841(b)(1)(A)(viii)—was based on the finding in the presentence report that petitioner was responsible for a gross amount of more than 907 grams of methamphetamine, coupled with "trial testimony regarding the purity of the methamphetamine." Pet. App. 18 n.2. Petitioner's *Strickland* claim was thus properly denied because no prejudice could have resulted from her attorney's failure to challenge the purity of the methamphetamine. See *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984).

3. Petitioner contends (Pet. 12-14) that the certificate-of-appealability provisions are unconstitutional because they "appear[] to take away any opportunity for appellate review."[8] The Act expressly permits appeal, however, if the prisoner can make a "substantial showing" of the denial of a constitutional right. AEDPA § 102, 110 Stat. 1217-1218 (to be codified at 28 U.S.C. 2253(c)(2)). Every court of

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[8] Petitioner also alleges that the new time-limit provisions, added to Section 2255 by Section 105 of the Act, 110 Stat. 1220, are unconstitutional. That claim is not properly before this Court, as no court has suggested that petitioner's Section 2255 motion was untimely. See *Lindh* v. *Murphy*, 96 F.3d 856, 866 (7th Cir. 1996) (en banc) (one-year time limit provisions of 28 U.S.C. 2244(d) and 2255 apply only to collateral attacks filed more than one year after effective date of the Act), cert. granted, 117 S. Ct. 726 (1997) (No. 96-6298).

appeals to consider the issue has held that the "substantial showing" requirement in Section 2253(c)(2) is identical to the showing that state prisoners had to make under former Section 2253 in order to appeal from an adverse district court decision on a habeas petition. See, *e.g.*, *Lyons* v. *Ohio Adult Parole Auth.*, 105 F.3d 1063, 1073 (6th Cir. 1997), petition for cert. pending, No. 96-1461 (filed Mar. 14, 1997); *Drinkard* v. *Johnson*, 97 F.3d 751, 755-756 (5th Cir. 1996), cert. denied, 117 S. Ct. 1114 (1997); *Herrera* v. *United States*, 96 F.3d 1010, 1012 (7th Cir. 1996). Cf. *Greenawalt* v. *Stewart*, 105 F.3d 1268, 1272-1273 (9th Cir.), cert. denied, 117 S. Ct. 794 (1997); *Lowell* v. *Prunty*, 91 F.3d 1358, 1359 (9th Cir. 1996), cert. denied, No. 96-7665 (Mar. 31, 1997); *Williams* v. *Calderon*, 83 F.3d 281, 286 (9th Cir. 1996). This Court's decision in *Barefoot* v. *Estelle*, 463 U.S. 880, 887-888, 892-893 (1983), which approved the certificate-of-probable-cause provisions of former Section 2253, makes clear that such a requirement is constitutional. Indeed, the Constitution does not require that appeal be made available on direct review, much less on collateral review.[9] See *Goeke* v. *Branch*, 514 U.S. 115, 120 (1995) (per curiam); *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); *Ross* v. *Moffitt*, 417 U.S. 600, 611 (1974); *McKane* v. *Durston*, 153 U.S. 684, 687 (1894).

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[9] The new certificate-of-appealability requirement differs from the certificate-of-probable-cause requirement under prior law in that the new provision requires a substantial showing as to particular issues, not the entire application for collateral review. But petitioner does not suggest that there is any constitutional significance to that change. Moreover, as noted above, the denial of a certificate on a constitutional claim demonstrates that the prisoner would not be able to prevail on appeal in any event.

Accordingly, petitioner's constitutional challenge is without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 96-1324

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

MARINA ZARNES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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ARGUMENT

In responding to the Government's Brief of the United States in Opposition of Marina Zarnes' request for petition for certiorari, the following should be considered by this court.

Landgraf v. USI Film Products, 511 U.S. 244 (1994), clearly states that "When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Ibid. This is a cornerstone of the *Landgraf* decision.

The AEDPA did not provide any clarity, provision or other direction concerning the retroactive application of its subparts, or its impact, in terms of a one-year limitation on the filing of habeas corpus petitions. It can be safely assumed, because of Congress' lack of clear intent, that the AEDPA would only act as a new rule of law for those individuals whose cases were dispositioned in final form, after April of 1996. Thus leaving those individuals who have never filed a habeas corpus petition, or filed such a petition prior to April 26th, or even after April 26th, but whose cases were dispositioned long before April 26, 1997, the freedom to file their motions under the old rule "at any time".

Neither the Certificate of Appealability should be applied retroactively, nor should the questions relating

to the restrictions in filing 2255 motions, or for that matter, 2254 motions for cases whose dispositions and final determinations occurred before April, 1996. Without a clear retroactive intent, no portion of the Reform Act should apply retroactively, thus leaving all defendants, whose case was dispositioned prior to April, 1996, a clear opportunity to file such habeas petitions at any time consistent with the standards of review applicable to their case (old law). To do anything less would violate *ex post facto* protections.

The rights of habeas corpus review, of which 2255 pleadings have been described, as well as 2254 pleadings, is subject to the protection of the Suspension Clause of the Tenth Amendment. Therefore, without a constitutional amendment or a complete change in the Tenth Amendment, there can be no application of the AEDPA, either in form or substance. Certainly there should be no retroactive impact on defendants who have lingered in the prison systems prior to the enactment of the AEDPA who have not yet filed a 2255 or 2254 petition.

As the government states, Section 102 does not restrict the scope of relief available under Section 2255, but merely controls the availability of appellate review. This is also a misnomer in relationship to the Act itself. Any restriction on even a portion of the Act to apply retrospectively is a violation of the Suspension Clause of the Tenth Amendment, as well as *ex post facto* amendments. There cannot be a bifurcation of the AEDPA. There was no intent by Congress to bifurcate its application retrospectively, much less an intent

shown that the Act, or a part thereof, should apply retroactively.

This court should decide whether or not the transition of any habeas corpus relief violates the Suspension Clause of the Tenth Amendment and whether or not Congress' intent under the AEDPA was to make the Act itself retroactive, in whole or in part. Such confusion cannot be tolerated at the expense of those whose liberty is at stake and whose lives are protected by the Constitution and laws of this country.

The government suggests that there will be no impact, and/or no effect, on the outcome of cases already involving constitutional claims. This would be an incorrect statement of fact. The district court, in Waco, Texas, has dismissed a petition for habeas corpus relief on the basis of the filing of such document, even prior to April, 1997, claiming such filings violate the AEDPA. See ***United States v. Blue***, Case No. W-96-CA-410 (W.D.Tx. 1997).

The case before the court does not have a simple answer and the only way that Petitioner Zarnes, and others, can be protected is for this court to review the matter in its entirety, formulating an opinion and guidance for all of the courts to follow concerning the retroactive application of the AEDPA in whole or in part. Without a clear intent from Congress, there can be no other interpretation but that the Act can only affect those whose cases are dispositioned in final form after April 23, 1996.

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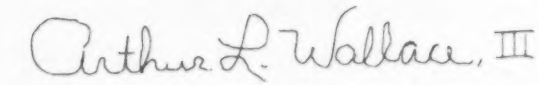
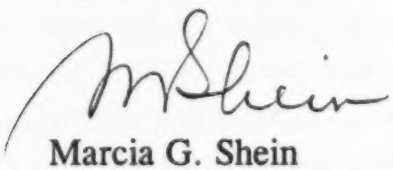
CONCLUSION

WHEREFORE, petitioner prays this court will grant her Petition for Certiorari and review the matter accordingly and provide such relief as the court deems appropriate.

Respectfully submitted,



Arthur L. Wallace



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